No. 19-1056

In the
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STEPHEN NICHOLS,

Plaintiff-Appellant,

v.

WAYNE COUNTY, ET AL,

Defendants-Appellees.

Appeal from the United States District Court
Eastern District of Michigan, Southern Division
Honorable Robert Cleland

BRIEF OF AMICUS CURIAE RUTHERFORD INSTITUTE IN SUPPORT OF PLAINTIFF-APPELLANT'S PETITION FOR EN BANC REVIEW

David Porter (P76785)
KIENBAUM HARDY VIVIANO
PELTON & FORREST, P.L.C.
Attorney for Rutherford Institute
280 N. Old Woodward Ave., Suite 400
Birmingham, MI 48009
(248) 645-0000
dporter@khvpf.com

John W. Whitehead
Douglas R. McKusick
THE RUTHERFORD INSTITUTE
109 Deerwood Road
Charlottesville, VA 22911

Dated: October 8, 2020

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT

The Rutherford Institute is a non-profit organization with no parent company or stock.

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

Rules

STATEMENT OF INTEREST OF AMICUS CURIAE RUTHERFORD INSTITUTE

The Rutherford Institute is an international nonprofit organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues. The Rutherford Institute works tirelessly to resist tyranny and threats to freedom, ensuring that the government abides by the rule of law and is held accountable when it infringes on the rights guaranteed to persons by Constitution and laws of the United States. The Rutherford Institute is interested in the resolution of this case because it touches on core questions of individual liberty and governmental accountability, which the federal constitution and the Bill of Rights were created to promote.

The Rutherford Institute files this brief under Federal Rule of Appellate Procedure 29(b).[1]

[1] No party's counsel authored this brief in whole or in part, and no person or entity, other than amicus and its counsel, contributed money that was intended to fund preparing or submitting the brief. *See* Fed. R. App. P. 29(a)(4)(E), (b)(4).

INTRODUCTION

Sending a distressing signal to citizens across this Circuit, a divided panel of this Court affirmed the abrupt dismissal of Stephen Nichols' complaint alleging serious civil-rights violations against the government agency that kept his car for *three years* while it made up its mind about whether to bring a forfeiture action.

In the process, the panel majority observed that "it is unclear why this happened" to Mr. Nichols. Sadly, it's not. Governmental agencies across this country, fueled by perverse incentives that inhere in our civil forfeiture schemes, routinely deprive citizens of their property for extended periods, only to extract extortionate "settlements" that allow citizens to keep their property—at a price. For that reason, Mr. Nichols' challenge to the lack of a continued detention hearing—the constitutional protection designed to stop this very kind of abuse—presents a significant legal issue of exceptional public importance. Amicus asks this Court to grant that petition.

ARGUMENT

I. Nichols' due process challenge to Michigan's civil forfeiture law presents a question of exceptional public importance.

This case is one of exceptional public importance, something that the panel majority affirmatively misjudged (albeit unwittingly) in the course of rejecting Mr. Nichols' municipal liability claim.

The panel majority rejected Mr. Nichol's due process claim because he failed to adequately plead that Wayne County—the entity that took his property and that stood to gain from its forfeiture—was legally responsible for his constitutional injury. That's wrong for the reasons stated by Mr. Nichols in his petition. But, on its way to reaching that conclusion, the majority paused to make a note, which, in Amicus' view, reflects a misunderstanding of what happened to Mr. Nichols and how it was consistent with his (adequately pleaded) allegations that Wayne County's policies and customs caused his injury.

Footnote One. In the first footnote of the panel decision, the majority remarked that "it is unclear why this happened" to Mr. Nichols. It then suggested that evidence that Wayne County provided in support of dismissal provided an answer. Wayne County, it noted, tried to "set up two meetings with Nichols' attorney, but the attorney failed to appear

both times," and the delay, it observed, was the product of a communication mishap. *Id.* (quoting the County's explanation that it "overlooked sending that correspondence"). In other words, it was simply a good-faith mistake.

Amicus respectfully submits that the majority misjudged the significance of these facts. Far from showing that Nichols' case was an unfortunate aberration, the facts demonstrate that it is yet another example of the injustice that results from agency policies that incentivize prolonged detention of seized property, undermining the majority's conclusion that Mr. Nichols did not properly plead municipal liability.

"Policing for Profit." For years, there has been mounting criticism of civil forfeiture schemes like the one here. The Rutherford Institute has long raised concerns about forfeiture abuse,[2] but it hasn't

[2] *See* The Rutherford Institute, *Constitutional Q & A: Civil Asset Forfeiture* (2017), available at https://www.rutherford.org/files_images/general/Rutherford_QA_Civil-Asset-Forfeiture.pdf.

been alone: U.S. Supreme Court justices,[3] legal scholars,[4] think-tanks,[5] politicians,[6] and, yes, even TV comedians[7] have all raised constitutional concerns about what many now call "policing for profit." As the Institute for Justice explains it:

> [C]ivil forfeiture laws in most states and at the federal level give law enforcement agencies a financial stake in forfeitures by awarding them some, if not all, of the proceeds. The financial incentive creates a conflict of interest and encourages the pursuit of property instead of the pursuit of justice.

---

[3] *See U.S. v. James Daniel Good,* 510 U.S. 43, 85 (1993) (Thomas, J., concurring in part and dissenting in part) ("[A]mbitious modern statutes and prosecutorial practices have all but detached themselves from the ancient notion of civil forfeiture").

[4] *See, e.g.*, Stefan B. Herpel, *Toward A Constitutional Kleptocracy: Civil Forfeiture in America*, 96 Mich. L. Rev. 1910 (1998).

[5] *See* Cato Institute, Adam Bates, *An Illustrated Guide to Civil Asset Forfeiture* (June 23, 2015), available at https://www.cato.org/blog/illustrated-guide-civil-asset-forfeiture.

[6] *See, e.g.*, *Federal Asset Forfeiture: Uses and Reforms: Hearing Before the Subcomm. on Crime, Terrorism, Homeland Security, and Investigations of the H. Comm. On the Judiciary*, 114th Cong. 1, 3 (2015) (statement of Rep. James Sensenbrenner).

[7] *Last Week Tonight with John Oliver: Civil Forfeiture* (HBO television broadcast Oct. 5, 2014), available at https://www.youtube.com/watch?v=3kEpZWGgJks.

Institute for Justice, *Policing for Profit: The Abuse of Civil Asset Forfeiture* 8 (2d ed. 2015).[8]

Once the government seizes valuable property—anything from a person's house, life savings, or, as in this case, car—it naturally holds massive leverage over the property owner. That leverage makes it possible to extract extortionate settlement agreements. Facing the prospect of years of litigation, unpredictable chances of success, and a steep resource imbalance, many owners—even innocent ones—conclude that the economically rational thing to do is let the government take some or all of their property.

This perverse incentive structure of forfeiture schemes produces predictable results. A 2014 investigation by the *Washington Post* identified over a thousand cases of property owners being forced to sign settlement agreements to recover money seized by the federal government. Michael Sallah et al., *Stop and Seize*, Washington Post (Sept. 6, 2014). The *Post* also found that government officials routinely offered to drop forfeiture proceedings if the owner agreed to give up a

[8] *See also* Institute for Justice, *Bad Apples or Bad Laws? Testing the Incentives of Civil Forfeiture* (Sept. 2014) available at https://ij.org/wp-content/uploads/2015/03/bad-apples-bad-laws.pdf.

portion of the proceeds. *Id.* A particularly notorious pattern played out in Tenaha, Texas, where authorities systematically used threats of criminal charges to pressure drivers into forfeiting cash taken during roadside seizures. Sarah Stillman, *Taken*, The New Yorker, Aug. 12 & 19, 2013, pp. 54–56. Tenaha, Texas, unfortunately, is not unique. *See, supra,* nn. 2–10.

Wayne County's Forfeiture Racket. The common thread in these cases runs right through Mr. Nichols' case, which brings us back to the panel majority's observation that "it is unclear why this happened" to Mr. Nichols. Unfortunately, it's not. Amicus submits that the facts described in footnote one are consistent with the strategies government agencies across the country use to shakedown innocent citizens.

This is corroborated—not contradicted—by the evidence cited by the majority. Wayne County admits that it decided not to proceed with forfeiture in "September/October 2015." (Declaration of Brian Moody, R. 6-2, Pg ID 57-58.) Roughly a year and half after it made that decision, in January 2017, Wayne County attempted to set a meeting with Nichols' counsel "to discuss the merits of the case." (Brian Moody Email, R. 6-8, Pg ID 79.) But by Wayne County's own lights, there were no merits to

discuss. It didn't need a meeting to release Mr. Nichols' property. It could have, as it later did, simply notified him in writing. (*See id.*)

The only plausible justification, then, for requesting the January 2017 meeting—again, *roughly a year and half after it had internally decided not to pursue forfeiture*—was to extract concessions from Mr. Nichols via a settlement agreement. It turns out, that is entirely consistent with another admission Wayne County made in support of dismissal that "[i]t is the normal practice of [Wayne County]" to contact property owners and, based on its review of the relevant information, to, among other things, "attempt[] to negotiate an out-of-court resolution with the owner/agent[.]" (Moody Dec., R. 6-2, Pg ID 57-58.) By Wayne County's own account, what happened was no aberration; it was "normal practice."

This matters. After pausing to imply that what happened to Mr. Nichols was a good-faith mistake, the panel majority went on to reject Nichols' constitutional claim because it was not clear enough from his complaint that Wayne County caused his constitutional violation. Again, that's wrong for the reasons Mr. Nichols says (and it is certainly no basis for a dismissal *with prejudice*). But it's doubly wrong given that the very

facts noted by the majority as favorable to Wayne County actually *corroborate* Mr. Nichols' municipal liability allegations.

II. The panel majority's decision abandons first principles of due process.

Amidst the mess of *Mathews*[9] factors, due process precedents, and elusive pleading standards, it's easy to lose sight of what this case is really about. At bottom, it's about the role our Due Process Clause is meant to play in our constitutional scheme. As James Madison explained:

> If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.

The Federalist No. 51, p. 269 (Gideon ed. 2001). The Due Process Clause is one such "auxiliary precaution."

Due Process as a Check. The Due Process Clause protects us against "the arbitrary exercise of the powers of government," *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (cleaned up), ensuring we are not left "at the mercy of *noblesse oblige*," *United States v. Stevens*, 559 U.S. 460,

[9] *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976).

480 (2010) (making the same point with respect to the First Amendment). It's *raison d'être* (to borrow another phrase from the French), is to check government agencies operating in systems that provide little or no incentive to respect citizens' rights.

The Importance of Due Process in Civil Forfeiture. Nowhere is this protection more important than in civil forfeiture schemes, where the incentives skew heavily in favor of the government, increasing the potential of "arbitrary exercise of the powers of government." *Daniels*, 474 U.S. at 331.

Our constitutional history confirms this. As two legal scholars have explained, "[f]inancial incentives promoting police lawlessness and selective enforcement, in the form of the customs writs of assistance, were among the key grievances that triggered the American Revolution" and later a constitutional promise that no one would be deprived of "life, liberty, or property, without due process." Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. Chi. L. Rev. 35, 75 (1998). That constitutional protection was designed to prevent one of the unjust effects of founding-era seizures: "extortionary agreements from subjects with no effective legal recourse." *Id*. at 76.

Sadly, little has changed for today's forfeiture claimants:

> The procedural advantages the Crown enjoyed resemble those confronting modern day forfeiture claimants. If the property was used in commerce, then each day spent fighting to establish a claim was another day's business lost. Consequently in colonial admiralty court, officials and property owners struck deals that placed the owner in the peculiar position of paying the state for the return of property.

Id. at 76 n.149.

For this reason, every federal court to have taken on this question has agreed with Mr. Nichols: due process requires a prompt post-seizure hearing to guard against arbitrary exercise of governmental power. (*See* App't Br., Doc. 24, pp. 34–36 (collecting cases).[10] Not the Sixth Circuit.

The majority's refusal to endorse these first principles of due process is even more troubling when you consider two facts: first, Michigan law doesn't require the government to make a forfeiture decision by a date certain, only that they do so "promptly," MCL § 445.79b(1)(c), and, as Nichols alleges, Wayne County routinely fails to do that. (Complaint, R. 1, Pg ID 2, 10, 13–14.) Second, by law, property

[10] *But see Serrano v. CBP*, No. 18-50977, 2020 WL 5539130, at *7 (5th Cir. Sept. 16, 2020) (rejecting a due process claim to a post-seizure, pre-forfeiture hearing because, unlike here, the claimant had a procedural mechanism to prompt the return of property).

owners are powerless to petition for their property back without a forfeiture proceeding. *See* MCL § 445.79b(2). These two facts add up to one bleak reality: the government decides whether an owner has an opportunity to be heard and how long to hold a person's property.

This is a problem begging for a due process solution. Unchecked power to keep a person's property while the prospect of permanent forfeiture looms creates incentives as powerful as they are perverse. Motivated—and naturally so—by the kind of self-interest and ambition that Madison spoke of in the Federalist No. 51, governmental agencies will wield that power to their advantage, delaying forfeitures to increase leverage over property owners. Clear-cut cases of wrongful seizure or unwarranted forfeiture become Pyrrhic victories for property owners who feel compelled to pay to get their property back, spurred by the increasing desperation caused by the government's delay.

Without a continued-detention hearing, citizens like Mr. Nichols are without a remedy, and our centuries-long bulwark against arbitrary government power becomes nothing more than a parchment barrier.

CONCLUSION AND RELIEF REQUESTED

For these reasons, the Rutherford Institute respectfully asks this Court to grant Mr. Nichols' petition for rehearing en banc.

Respectfully submitted,

Kienbaum Hardy Viviano Pelton
& Forrest, P.L.C.

By: */s/ David Porter*
David A. Porter (P76785)
Attorney for Rutherford Institute
280 N. Old Woodward Ave., Suite 400
Birmingham, MI 48009
(248) 645-0000
dporter@khvpf.com

Dated: October 8, 2020

John W. Whitehead
Douglas R. McKusick
THE RUTHERFORD INSTITUTE
109 Deerwood Road
Charlottesville, VA 22911

CERTIFICATE OF COMPLIANCE

Certificate of Compliance with Type-Volume Limit,
Typeface Requirements, and Type Style Requirements

1. This amicus brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), this amicus brief contains no more than 2,600 words. This document contains 2,596 words.

2. This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Word 2013 in 14-point Century Schoolbook.

Kienbaum Hardy Viviano Pelton
& Forrest, P.L.C.

By: */s/ David Porter*
David Porter (P76785)
Attorney for Rutherford Institute
280 N. Old Woodward Ave., Suite 400
Birmingham, MI 48009
(248) 645-0000
dporter@khvpf.com

CERTIFICATE OF SERVICE

I certify that on October 8, 2020, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

Kienbaum Hardy Viviano Pelton
& Forrest, P.L.C.

By: */s/ David Porter*
David Porter (P76785)
Attorney for Rutherford Institute
280 N. Old Woodward Ave., Suite 400
Birmingham, MI 48009
(248) 645-0000
dporter@khvpf.com